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SUPREME COURT, U.S.

No. 77-841

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Seventh Circuit is now reported. Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977).

JURISDICTION

Respondents agree that this Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the Eleventh Amendment a jurisdictional bar to a decree which does not purport to adjudicate the monetary liability of state officials, but instead merely requires the state officials to send notices advising plaintiffs that there are available state administrative remedies, as established by the Illinois legislature, to challenge the legality of the denial of benefits?

STATEMENT OF THE CASE

Respondents supplement the statement of the case as set forth in the petitioner's brief insofar as it fails to articulate the reasoning of the trial court, Jordan v. Trainor, 405 F. Supp. 802 (N.D. Ill. 1975), and the reasoning of the en banc decision of the Seventh Circuit, Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977). Upon remand from Edelman v. Jordan, 415 U.S. 651 (1974), the plaintiffs filed a motion for an order requiring the defendants only to notify the members of the plaintiff class of the pre-existing state administrative procedures for recovering public assistance benefits wrongfully denied. The trial court in a well-reasoned opinion concluded that the Eleventh Amendment, as interpreted in Edelman, barred an "award by a federal court of direct monetary relief against a state, rather than orders requiring the state to change existing policy or to inform citizens of their rights under state and federal law ..." Jordan v. Trainor, 405 F. Supp. at 805. As to the notice relief sought, the trial court concluded that it fell outside the area proscribed by the Edelman opinion because the Eleventh Amendment was never intended to allow "a state to keep secret the fact that a number of its citizens may, under established state procedures, have valid claims against it." Id. at 806.

The en banc decision of the Seventh Circuit agreed with the reasoning of the trial court. First, the court analyzed the Edelman decision which held that the Eleventh Amendment barred a federal court from imposing against the state "the award of an accrued monetary liability" which was indistinguishable from an award of damages. (415 U.S. at 664) However, the en banc decision noted that notice relief "would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court."[1/] 563 F.2d at 876. In

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1/ "The parties agree that there are or may be various defenses available to defendant which could be raised in the state proceeding. The federal court would in no way be involved in any determination of whether or not past benefits were in fact due from the state." Jordan v. Trainor, 563 F.2d at 875.

other words, "[a]s for the state, our decision means only that if an [administrative] appeal be filed in the future by a class member, the state may determine for itself by its own procedures whether any back payment may be due the applicant." Id. at 878. Moreover, the Court of Appeals specifically reversed those portions of the Order which implied an adjudication of liability; the extensive quotations from the Order at p.6 of the Petition for Certiorari are therefore no longer involved in the case, a fact petitioner neglects to mention. Petitioner's attempt to assert that his liability has been adjudicated is belied by the Court of Appeals' reversal of the District Court Order insofar as it even implied such an adjudication.

REASONS FOR DENYING THE WRIT

I. THE EN BANC DECISION OF THE SEVENTH CIRCUIT IS CONSISTENT WITH THE EDELMAN DECISION.

In Edelman v. Jordan, 415 U.S. 651 (1974), this Court upheld the principle that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Id. at 663. Repeatedly, this Court emphasized that the fatal defect in the judgment was that it imposed an "award of an accrued monetary liability" (Id. at 664), and that such relief was "in practical effect indistinguishable in many aspects from an award of damages against the state." (Id. at 668) In other words, insofar as the judgment was the equivalent of a debt or a liability against the state, it was within the scope of the historic immunity of states from suits in federal courts, as described in Monaco v. Mississippi, 292 U.S. 323-324 (1934):

> "'Hamilton in the Federalist, No. 81, made the following emphatic statement of the general principle of immunity: ...'[T]here is no color to pretend that the state government would by the adoption of that plan [the Constitution] be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligation of good faith ... To what purpose would it be to authorize suits against

states for the debts they owe: How could recoveries be enforced: It is evident it could not be done without waging war against the contracting state ...'" Edelman v. Jordan, 415 U.S. at 660 n.19.

The majority in Edelman recognized, however, that this historic immunity of the states, subsequently embodied in the Eleventh Amendment, was limited to a great extent by the decision in Ex Parte Young, 209 U.S. 123 (1908). Under that decision, federal courts, notwithstanding the Eleventh Amendment, were held to have jurisdiction to grant certain kinds of relief against state officials, and, since that decision, it has become commonplace for the federal courts to enter injunctions against state officials. But the majority concluded that the doctrine of Ex Parte Young, consistent with the Eleventh Amendment, did not embrace "a retroactive award which requires the payment of funds from the state treasury ..." Id. at 677. See generally, LeClerq, State Immunity and Federal Judicial Power - Retreat from National Supremacy, 27 U.Fla.L.Rev. 361 (1975).2/

In drawing the line between permissible relief against state officers under the Ex Parte Young doctrine and impermissible awards establishing liabilities against states, the majority emphasized the narrowness of its holding - it was limited to "the award actually made in this case, and not one which might have been differently tailored." Id. at 665. Further, the Court stated:

> "As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex Parte Young will not in many instances be that between day and night." Id. at 667.

Obviously, the propriety of notice relief was neither presented to, nor considered by, this Court in Edelman, and therefore there is simply no "law of the case" relevant to the issue presented, contrary to the claim of the petitioner. (Pet. Br. at 9) Both the trial court and the en banc decision recognized that the notice relief is neither an award of direct monetary relief nor equitable restitution against the state. The relief does not

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2/ Liberman, State Sovereign Immunity in Suits to Enforce Federal Rights, 1977 Wash.U.L.Q. 195.

establish a debt against the state nor an accrued monetary liability against the state. The federal court is not placed in the position of adjudicating any monetary liability of the state or enforcing a debt or damages against the state. Because the notice relief requires only the sending of notices, and is not an award of damages, it is enforceable by means of the contempt power of the federal courts to the degree - but only to the degree - that notice is not sent. See Rodriguez v. Swank, 496 F.2d 1110 (7th Cir. 1974), cert. denied, 419 U.S. 885 (1974). Thus the problems alluded to in Edelman (supra at 3) in enforcing judgments against states for debts or liabilities are not presented by notice relief.

In addition, any payments to the members of the plaintiff class would not be based on the judgment below. If the notices were sent, and administrative appeals taken, and then the public aid officials refused to make any payments, they would not be in contempt of the federal court judgment. The only remedy of the plaintiffs would be to file a complaint for administrative review in the state courts in accordance with Illinois law. Ill. Rev. Stat., ch. 23, §11-8.7.

For all of the above reasons, there can be little doubt that the notice relief, upheld by the en banc decision of the Seventh Circuit, is very different, factually and analytically, from the original award of retroactive benefits. See Fitzpatrick v. Bitzer, 407 U.S. 445, 459 (1976) (concurring opinion, Stevens J.). Precisely this distinction between notice relief and direct monetary benefits was upheld by this Court in its summary affirmance in Grubb v. Sterrett, 400 U.S. 922 (1971), aff'g, 315 F. Supp. 990 (N.D. Ill. 1970),[3/] and this decision was not overruled by Edelman. See Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973),

3/ The three-judge court in Grubb upheld the notice relief granted in that case with the following reasoning:

> "This court did not enter a money judgment against the State of Indiana. Rather, it remanded the claims of members of plaintiff class for retroactive payment of wrongfully withheld welfare assistance for determination by the Indiana DPW in accordance with its already-established procedures. This

[continued on page 6]

cert. denied, 421 U.S. 920 (1975); Morris v. Houston, 0-250-73 (W.D. Mich. Oct. 18, 1974) (discussed in Jordan v. Trainor, 405 F. Supp. 802, 806-07 (N.D. Ill. 1975).

Notice relief, moreover, is entirely consistent with the principles enunciated in Edelman. This relief properly shifts to the state administrative and judicial apparatus the burden of effectuating the rights of the plaintiffs, and in that way reinforces the notions of federalism embodied in the Eleventh Amendment. Further, notice relief promotes the principles of cooperative federalism inherent in the federal-state public assistance programs. Notice of the availability of possible relief through existing state remedies, where the state agency itself, and state courts, would be the sole arbiters of whether any monetary relief would be granted, respects the limited role of federal courts in our federalist system, and at the same time, provides state law remedies to redress violations of federal law and thereby insures governmental accountability. See Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U.Colo.L.Rev. 1, 55, 59-60 (1972); Baker, Federalism and The Eleventh Amendment, 48 U.Col.L.Rev. 139 (1977). In sum, the current decree represents simply a termination of a class action by notice to the class that they may have certain additional rights, but adjudication of those additional rights is now beyond the federal court's power. Far from being an extension of the federal court's power, the notice concedes the limits of such power.

3/[continued from page 5]

> Court did impose some specific additional requirements as to the procedure by which the Indiana DPW was to consider such appeals as may be taken. These procedural requirements were necessary under the facts and circumstances of this case in order to inform members of plaintiff's class of this decision and their rights and privileges thereunder. The imposition of these procedural requirements was within the broad remedial power of federal courts to grant supplemental relief which is necessary to give meaningful effect to their judgments and decrees. See, e.g., Sullivan v. Little Hunting Park, Inc., 90 S.Ct. 400, 405 (1969)." Grubb v. Sterrett, Civ. No. 69 F 3, Memorandum and Order (N.D. Ind. June 8, 1970) (Cummings, Grant, Eschbach) (Emphasis in original.)

Finally, the notice relief approved by the Seventh Circuit may be upheld on the bases of related but alternative rationales. The members of the plaintiff class in this case have never received notice of denial of benefits as required by due process, federal regulations, and state law. Accordingly, the notice relief falls squarely within the federal court's remedial power, consistent with the Eleventh Amendment, to grant prospective injunctive relief.

It cannot be denied that the members of the plaintiff class are entitled under the due process clause to written notice detailing the reasons supporting the department's denial of AABD benefits to which they claim they are entitled. Goldberg v. Kelly, 397 U.S. 254 (1970); Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973); Mothers and Children's Rights Organization v. Sterrett, 467 F.2d 797 (7th Cir. 1972); Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1974); Barnett v. Lindsay, 319 F. Supp. 610 (D. Utah 1970). Similarly, federal regulations require written notice of a denial of benefits, and also "the reasons for and specific regulations supporting such actions, and an explanation of the individual's right to request a hearing." 45 C.F.R. §206.10(a)(4); see 45 C.F.R. §205.10(a)(3). In addition, Illinois law (Ill. Rev. Stat., ch. 23, §11-2) requires public aid officials to perform their duties "in such manner as to secure for every recipient the aid and services to which he may be entitled." (Under federal regulations, the petitioner could make payments to the members of the plaintiff class without hearings, and receive federal financial participation. 45 C.F.R. §§205.10(a)(18) and 205.10(b)). Further, Illinois case law clearly establishes the requirement that public aid officials send written notice of a denial of benefits, and improper payment alone is insufficient to satisfy the notice requirements of state law. Isabell v. Dept. of Public Aid, 18 Ill. App.3d 868 (1st Dist. 1974); Mann v. Illinois Dept. of Public Aid, 31 Ill. App.2d 430 (1975). In summary, then,

the state public aid officials in this case, by failing to send the notices akin to those ordered by the Seventh Circuit, have violated, and continue to violate the plaintiffs' right under the due process clause, federal regulations, and under state law. The injunction of the district court therefore may be viewed as the traditional prospective injunction requiring state officials to conform their conduct to the requirements of federal law. E.g., Milliken v. Bradley, ___ U.S. __ 97 S.Ct. ___, 53 L.Ed.2d 745, 761-62 (1977).

II. THE EN BANC DECISION OF THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT, AND PRESENTS NO SIGNIFICANT ISSUE WARRANTING PLENARY REVIEW.

The petitioner in his brief (p.7) contends that the en banc decision of the Seventh Circuit is in conflict with Fanty v. Commonwealth of Pa., 551 F.2d 2 (3d Cir. 1977), pet. for cert. filed sub nom., Randle v. Beal. First, the petitioner misleads the Court by suggesting that the Third Circuit rejected "the reasoning adopted by the Seventh Circuit in its en banc opinion." (Pet. Br. at 7) The Fanty decision preceded the Seventh Circuit's en banc decision, and thus it did not, and could not have taken into account the Seventh Circuit's en banc decision. On the other hand, the en banc decision of the Seventh Circuit did review the Fanty decision, and noted that each of the three judges adopted differing views of the scope of the Eleventh Amendment bar. Only Judge Seitz concluded that notices ordered in that case were contrary to the teachings of Edelman. In his opinion, he stated that the essential tests for determining whether relief violated the Eleventh Amendment were whether the relief operated against the sovereign itself, and not merely against a state officer, and whether the relief was based upon a past breach of legal duty. Id. at 4. These tests, however, were not adopted in Edelman, and have in fact been rejected by the Court as the bases for determining what relief against state officers is consistent with the Eleventh Amendment. Milliken v. Bradley, ___ U.S. ___ , 97 S.Ct. ___, 53 L.Ed.2d 745, 761-62 (1977).

A second judge in Fanty, Judge Garth, in dicta, viewed the Eleventh Amendment question as "borderline," (551 F.2d at 6) and then proceeded to hold that the case should have been dismissed because there was no case or controversy. A third opinion, written by dissenting Judge James Hunter III, concluded that the notice relief granted by the trial court did not violate the Eleventh Amendment. In sum, it can hardly be said that the Third Circuit decision in Fanty is squarely in conflict with the en banc decision of the Seventh Circuit. On the contrary, two of the three judges in Fanty, as well as the trial court judge, appear to be closer to the Seventh Circuit's interpretation of the scope of the Eleventh Amendment bar.

No other Circuit has been confronted with the narrow Eleventh Amendment issue presented in the Petition. Based on this sparseness of law on the question presented by the petition in this case, it certainly appears premature for this Court to give plenary consideration once again to the contours of the Eleventh Amendment. Drawing the lines between Edelman and Ex Parte Young should be attended to, in the first instance by the lower federal courts, and only after a clear conflict between the Circuits presents itself, if in fact one does so develop, should this Court give plenary consideration to the Eleventh Amendment issues presented herein. The narrow issue presented by the petition hardly reaches the standard set forth in Supreme Court Rule 19.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE
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No. 77-841

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Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, JOHN JORDAN, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Respondent's affidavit in support of this motion is not attached hereto, but will follow shortly. Respondent proceeded in forma pauperis in the district court and the Court of Appeals below, and, in addition, by this Court at an earlier stage of this litigation, Edelman v. Jordan, 415 U.S. 651 (1974). A copy of John Jordan's affidavit in the latter case is attached hereto.

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No. 72-1410

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

JOEL EDELMAN, Director of Illinois Department of Public Aid, and Successor to EDWARD WEAVER, Former Director of Public Aid, Petitioner,

vs.

JOHN JORDAN, et al., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

A F F I D A V I T

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

I, JOHN JORDAN, being first duly sworn, depose and say, in support of the motion for leave to proceed in forma pauperis and without payment of costs or fees and without printing:

1. I am the named respondent in the above case.

2. I presently receive Aid to the Disabled.

3. Because of my poverty, I am unable to pay the costs of said cause, or to give security for this cause.

4. I believe that I, and other members of the class, are entitled to the relief granted by the lower court in this cause.

5. This cause involves the rights of AABD recipients

in Illinois to secure AABD benefits wrongfully denied them.

JOHN JORDAN

Subscribed and sworn to before me this 16th day of May, A.D., 1973.

Lena Burrell
Care taker

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

PROOF OF SERVICE

SHELDON ROODMAN certifies that he is one of the attorneys for respondents in the above-entitled matter and that a copy of Respondents' Brief in Opposition to the Petition for a Writ of Certiorari was served on

William J. Scott
Attorney General
Attention, William Wenzel
Welfare Litigation Unit
130 North Franklin Street
Chicago, IL 60606

by depositing a copy of same in a mailbox with first-class postage prepaid this 5th day of January, 1978.

Sheldon Roodman

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